

**A Koperasi Wanita Sarawak Bhd & Anor v
Robert Sim Teck Hock**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02-802 OF 2000
B ABDUL KADIR SULAIMAN, TENGKU BAHARUDIN SHAH JJCA AND
CLEMENT SKINNER J
18 MAY 2005

Trust and Trustees — Creation of trust — Trust created when property not vested in trustee completely — No consideration from beneficiary — Whether trust validly created

C *Trust and Trustees — Land — Caveat — Interest under a trust — Claim by beneficiary — Whether trust properly constituted — Whether property vested in trustee — Whether enforceable — Whether beneficiary mere volunteers*

D The first appellant had applied by letter of application to the relevant authorities for the alienation of 36 acres of land ('the land'). In the application letter to the relevant authorities for alienation of the land the first appellant declared itself as the trustee in trust for the parties in the trust deed ('the trust deed'). The respondent had a 15% beneficial interest. There was no consideration paid by the respondent to the first appellant for his beneficial interest. It was stated in the trust deed that the first appellant will at the request and costs of the beneficiaries named therein transfer their respective shares upon alienation of the land. At the material time when the trust deed was executed the land was yet to be alienated by the authorities to the first appellant. The land was only alienated to the first appellant some three years later. By then the respondent claimed that he had increased his beneficial interest to 25% ($\frac{1}{4}$ share) in the land. The respondent entered a caveat on the land under s 173 of the Sarawak Land Code claiming to be beneficially interested in $\frac{1}{4}$ undivided share of the land. This caveat was entered by the respondent more than 12 years after the date of the trust deed and nine years after the alienation of the land to the first appellant. The respondent filed an originating summons under s 178 of the Sarawak Land Code seeking an order from the High Court that the caveat lodged by him affecting his $\frac{1}{4}$ undivided right, title, share and interest in the land shall not lapse and shall not be removed and shall be allowed to remain on the Land Register until further order. The High Court gave the order, thus this appeal.

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Held, allowing the appeal:

(1) A trust is only valid if the title to the property is vested in the trustee completely and if the trust has been validly declared. In this case, the trust deed was created when the first appellant had no title, right or interest at all in the land. All that the first appellant did was to make an application to the relevant authorities for alienation of the land. A mere

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application letter does not create any title right or interest in the land. A trust cannot be created over the mere application letter for the land. In light of the fact that the first appellant had no title, right or interest at all in the land when the trust deed was created it followed that the trust deed was not completely constituted and the alleged declaration of trust by the first appellant in favour of the respondent and the other beneficiaries was ineffective, null and void (see para 17).

- (2) It followed therefore that the respondent's lodgment of the caveat on the land based on his alleged claim of $\frac{1}{4}$ beneficial interest in the land under the trust deed was invalid in law. The respondent had no caveatable interest in the land when he lodged the caveat and the caveat must be removed forthwith (see para 18).
- (3) The High Court did not decide on the issue whether the respondent was a volunteer and whether the trust deed in respect of a future expectancy would be enforced by the court. This was a misdirection by the High Court. The issue of whether the respondent was a volunteer was a question of law to be determined by the court. In this case, the trust was incompletely constituted and further the respondent did not give any consideration whatsoever for the creation of the trust. He was a mere volunteer. The court, therefore, would not render assistance to a volunteer in the case of an incompletely constituted trust (see para 24).
- (4) In this case, after the respondent lodged the caveat, he only filed the writ and served it on the appellant some seven years later. There was no explanation at all from the respondent for this delay. This delay by the respondent was inordinate and inexorable and was fatal to the respondent's case (see para 33).

[Bahasa Malaysia summary]

Perayu pertama telah memohon melalui surat permohonan kepada pihak berkuasa yang berkenaan untuk pemberimilikan 36 ekar tanah ('tanah tersebut'). Dalam surat permohonan kepada pihak berkuasa berkenaan untuk pemberimilikan tanah tersebut perayu pertama telah mengisytiharkan dirinya sebagai pemegang amanah dalam memegang amanah pihak-pihak dalam suatu surat ikatan amanah ('surat ikatan amanah tersebut tersebut'). Responden mempunyai 15% faedah benefisial. Tiada balasan dibayar oleh responden kepada perayu pertama untuk faedah benefisial beliau. Dinyatakan dalam surat ikatan amanah tersebut bahawa perayu pertama akan permintaan dan kos benefisiari-benefisiari yang dinamakan, memindahkan syer-syer masing-masing apabila tanah tersebut diberimilik. Pada masa matan apabila surat ikatan amanah disempurnakan tanah tersebut belum diberimilik oleh pihak berkuasa kepada perayu pertama. Tanah tersebut hanya diberimilik kepada perayu pertama tiga tahun kemudian. Pada masa itu responden

- A** mendakwa bahawa beliau telah menambah faedah benefisial kepada 25% ($\frac{1}{4}$ daripada jumlah syer) dalam tanah tersebut. Responden telah memasuki satu kaveat ke atas tanah tersebut di bawah s 173 Kanun Tanah Sarawak menuntut mempunyai kepentingan benefisial dalam $\frac{1}{4}$ daripada syer tidak dibahagikan tanah tersebut. Kaveat telah dimasuki oleh responden lebih 12 tahun daripada
- B** tarikh surat ikatan dibuat dan sembilan tahun selepas perolehan tanah tersebut kepada perayu pertama. Responden telah memfailkan satu saman pemula di bawah s 178 Kanun Tanah Sarawak memohon satu perintah daripada Mahkamah Tinggi bahawa kaveat yang dimasuki oleh beliau yang melibatkan $\frac{1}{4}$ daripada hak, hak milik, bahagian dan kepentingan tidak dibahagikan dalam tanah tersebut tidak luput dan tidak dibatalkan dan hendaklah dibenarkan kekal atas Daftar Tanah sehingga perintah seterusnya. Mahkamah membenarkan perintah tersebut, oleh rayuan ini dibuat.
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Diputuskan, membenarkan rayuan tersebut:

- D** (1) Suatu amanah hanya sah jika hak milik ke atas hartanah terletak dalam pemegang amanah sepenuhnya dan jika amanah itu diisytiharkan secara sah. Dalam kes ini, surat ikatan amanah tersebut telah dibuat apabila perayu pertama tidak mempunyai hak milik, hak atau kepentingan langsung ke atas tanah tersebut. Apa yang perayu pertama lakukan adalah satu permohonan kepada pihak berkuasa yang berkenaan untuk pemberimilikan tanah tersebut. Surat permohonan semata-mata tidak membentuk apa-apa hak milik, hak atau kepentingan ke atas tanah tersebut. Suatu amanah tidak boleh dibentuk berdasarkan surat permohonan semata-mata untuk tanah tersebut. Memandangkan fakta bahawa perayu pertama tiada hak milik, hak atau kepentingan langsung ke atas tanah tersebut apabila surat ikatan amanah tersebut dibentuk oleh itu surat ikatan amanah tersebut tidak dibentuk dengan sempurna dan deklarasi amanah yang dikatakan oleh perayu pertama menyebelahi responden dan benefisiari-benefisiari lain adalah tidak berkuatkuasa, terbatal dan tidak sah (lihat perenggan 17).
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- G** 2) Berdasarkan itu kemasukan kaveat ke atas tanah tersebut oleh responden yang berdasarkan tuntutan yang dikatakan oleh beliau terhadap $\frac{1}{4}$ daripada kepentingan benefisial ke atas tanah tersebut di bawah surat ikatan tanah tersebut adalah tidak sah di sisi undang-undang. Responden tiada kepentingan kaveat dalam tanah tersebut apabila memasukkan kaveat itu dan kaveat itu hendaklah dibatalkan (lihat perenggan 18).
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- I** (3) Mahkamah Tinggi tidak memutuskan persoalan sama ada responden adalah sukarelawan dan sama ada surat ikatan amanah tersebut berhubung jangkaan masa hadapan akan dikuatkuasakan oleh mahkamah. Ini adalah satu salah arah oleh Mahkamah Tinggi. Persoalan sama ada responden seorang sukarelawan adalah persoalan undang-

undang yang perlu ditentukan oleh mahkamah. Dalam kes ini, amanah tersebut tidak dibentuk dengan lengkap dan seterusnya responden tidak memberikan apa-apa balasan untuk pembentukan amanah tersebut. Beliau hanya seorang sukarelawan. Mahkamah, oleh itu, tidak boleh membantu sukarelawan dalam kes pembentukan amanah yang tidak lengkap (lihat perenggan 24).

- (4) Dalam kes ini, selepas responden memasukkan kaveat, beliau hanya memfailkan writ dan menyampaikannya ke atas perayu tujuh tahun kemudian. Tiada penjelasan langsung daripada responden tentang kelewatan ini. Kelewatan oleh responden tidak teratur dan tidak munasabah dan membawa padah kepada kes responden (lihat perenggan 33).]

Notes

For a case on caveat on land, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2078.

For a case on creation of trust generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2019.

Cases referred to

- Dow Jones (Asia) Inc, Re Application by* [1988] 1 MLJ 222 (refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437 (refd)
Hew Sook Ying v Hiv Tin Hee [1992] 2 MLJ 189 (refd)
Lee Eng Teh & Ors v Teh Thiang Seong & Anor [1967] 1 MLJ 42 (refd)
Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Milroy v Lord (1862) 4 De GF & J 264; 45 ER 1185 (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614 (refd)

Legislation referred to

Sarawak Land Code s 173, 178

Victor LF Wong (Victor Wong & Chiew) for the appellant.
Alvin SL Yong (Tan, Yap & Tang) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] We had on 29 January 2004 allowed the appellants' appeal with costs and ordered that the caveat lodged on the land by the respondent on 1 October 1993 be removed forthwith. We now give our reasons for doing so.

A [2] First, we state the background facts leading to the respondent to lodge a caveat on the land. The first appellant, Koperasi Wanita Sarawak Bhd had by letter of application dated 23 November 1979 applied to the relevant authorities for the alienation of 36 acres of land under Lots 150, 149, 1677, 1693, 1695 and part of Lot 51 Miri Concession Land District ('the land').

B [3] By a Trust Deed dated 18 June 1981 ('the trust deed'), the first appellant declared itself as the trustee in the application letter to the relevant authorities for alienation of the land in trust for the parties and in the proportionate shares as stated in schedule one of the trust deed. There are 9 beneficiaries under the trust deed. The respondent, Robert Sim Teck Hock
C had a 15% beneficial interest, Helena Vida Bayang had 5% beneficial interest and Jorkinah bte Hashim also had 5% beneficial interest.

D [4] We note from the trust deed found at pp 106 to 109 of the appeal record that there was no consideration at all stated or paid by the respondent to the first appellant for his 15% beneficial interest in the said application for the land. The other beneficiaries too had not paid any consideration for their respective beneficial interest.

E [5] It is stated in the trust deed that the first appellant will at the request and costs of the beneficiaries named therein transfer their respective shares upon alienation of the land. At the material time when the trust deed was executed on 18 June 1981 the land was yet to be alienated by the authorities to the first appellant. The land was only alienated to the first appellant on 27 July 1984, some three years later.

F [6] Subsequently by a deed dated 24 December 1981 entered into between the respondent and Helena Vida Bayang ('the first deed') and for a consideration of RM75,000 the respondent purported to acquire by way of assignment the 5% beneficial share of Helena Vida Bayang. By another deed dated 6 April 1983 entered into between the respondent and Jorkinah bte Hashim ('the second deed') and for a similar consideration of RM75,000 the
G respondent purported to acquire by way of assignment the 5% beneficial share of Jorkinah bte Hashim. Therefore the respondent claimed that he had increased his beneficial interest to 25% ($\frac{1}{4}$ th share) in the land.

H [7] On 15 November 1984, that is about four months after the land was alienated to the first appellant, the first appellant entered into an agreement with Unibor Sdn Bhd for the development of the land ('the development agreement'). Under the development agreement the first appellant had granted Unibor Sdn Bhd the sole right to develop the land on behalf of the first appellant.

I [8] In accordance with cl 2(a) of the development agreement the first appellant had on 15 November 1984 granted to Unibor Sdn Bhd an irrevocable power of attorney to develop the land and to act in the name of

the first appellant in any court of law or other proceeding arising out of or in relation to the land. Unibor Sdn Bhd also lodged a caveat on the land on 10 November 1987.

[9] On 1 October 1993 the respondent entered a caveat on the land under s 173 of the Sarawak Land Code (Cap 81) claiming to be beneficially interested in $\frac{1}{4}$ th undivided share of the land. This caveat was entered by the respondent more than 12 years after the date of the trust deed and nine years after the alienation of the land to the first appellant. The respondent's case is that he had acquired a $\frac{1}{4}$ beneficial interest in the land pursuant to the trust deed, the first deed and the second deed.

[10] The second appellant Mr Yong Chee Poh had agreed to grant a loan to Unibor Sdn Bhd to develop the land. Mr Yong Chee Boh had agreed to grant the loan in consideration of a memorandum of charge being executed and entered on the land. The memorandum of charge was executed on 23 October 1999 and upon its presentation to the Land Office, the registrar of Land and Survey Department, Miri Division issued a notice dated 4 November 1999 to the respondent under s 178 of the Sarawak Land Code. The registrar's notice stated that the caveat of the respondent of 1 October 1993 shall be deemed to have lapsed after the expiry of three months from the date thereof unless further extended or otherwise ordered by the court.

[11] On 4 January 2000 the respondent filed the Originating Summons under s 178 of the Sarawak Land Code seeking an order from the High Court in Miri that the caveat lodged by him on 1 October 1993 affecting his $\frac{1}{4}$ undivided right, title, share and interest in the land shall not lapse and shall not be removed and shall be allowed to remain on the Land Register until further order.

[12] On 27 October 2000 the learned judicial commissioner ordered that the caveat lodged on the land by the respondent on 1 October 1993 shall not lapse and shall not be removed but shall be allowed to remain on the land register until further order. The appellants appealed to this court against the said decision of the learned judicial commissioner.

TRUST DEED NOT COMPLETELY CONSTITUTED

[13] The appellant's counsel had attacked the learned judicial commissioner's decision on several grounds. We will deal with some of the grounds which merit our consideration. In this appeal before us we find that the trust purported to be created under the trust deed of 18 June 1981 was an incompletely constituted trust. When the trust deed was created on 18 June 1981 the first appellant had no title, right or interest in the land. The first appellant had only made an application by letter dated 23 November 1979 to the relevant authorities for alienation of the land. A mere application letter does not create any title, right or interest in the land. The land was only

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- A** alienated to the first appellant on 27 July 1984 more than three years later. A trust is only valid if the title to the land is vested in the name of the trustee, in this case, the first appellant, which was not the case then. Therefore a declaration by the first appellant under the trust deed on 18 June 1981 that it holds the land on trust for the respondent and the other eight beneficiaries
- B** when the first appellant then had no title at all to the land is ineffective and invalid in law and in equity. It is an incompletely constituted trust. It is settled law that the courts will not enforce an incompletely constituted trust.

- C** [14] This basic principle of law is clearly stated in the leading text *Hanbury & Martin Modern Equity* by Professor Jill E Martin (16th Ed, 2001) at p 69 as follows:

- D** *Completely and Incompletely Constituted Trusts.* There cannot be a trust unless the trust is completely constituted. This heading is therefore irrational; it is dealing, not with two different types of trust, but with a rule for distinguishing what is a trust from something that is void. Nevertheless, it is convenient to make the point here, and to deal in more detail with the matter below.

- E** A trust is only valid if the title to the property is in the trustee and if the trusts have been validly declared. A declaration that A holds on trust for B is ineffective if the property is not vested in A. The trust becomes constituted and valid when the property is vested in A. The form of transfer to A depends on the nature of the property — land, chattel, money, shares in a company, copyrights, patents, debts or other choses in action — and the appropriate method must of course be used. In the case of a trust of land there must also be written evidence of the declaration of trust. The settlor may of course declare himself trustee, and there is then an automatic constitution, because title was in the settlor throughout.
- F** Testamentary trusts are always completely constituted; for the executors, if not the trustees themselves, are under a duty to transfer the trust property to the nominated trustees.

- G** Although no trust is created unless the trust is completely constituted, there are situations where intended beneficiaries under an incompletely constituted trust may compel the transfer of the property to the trustees. In general, they can do so if they have given consideration, but not if they are volunteers, for there is yet no trust and ‘equity will not assist a volunteer’.

- H** [15] In the case of trusts by transfer, a further step is required to completely constitute the trust, the classic statement of which is found in the judgment of Turner LJ in *Milroy v Lord* (1862) 4 De GF & J 264 at 274–275; 45 ER 1185 at 1189–90:

- I** I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual,

and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.

[16] The case of *Milroy v Lord* was followed and applied by our Supreme Court in the case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 at 624 where it was held as follows:

The three essentials of a valid trust are: (a) certainty of words; (b) certainty of subject; and (c) certainty of object. Looking at the seven trust deeds except for that in Civil Appeal No 5, there is certainty of words and also there is certainty of object, ie the names of beneficiaries, but there is no certainty of subject, ie trust property, viz the lands, because the beneficial ownership of the lands passed to the purchasers of those subsidiary agreements of sale and purchase in 1969 when the sale of these lands took place, ie before the trust deeds were executed. The Lee brothers, named as the trustees of these trust deeds, were also the settlors of the trusts created by those trust deeds. It is a rule that a settlor must vest the trust property (subject) in the trustee completely, please see *Milroy v Lord*. How could the settlors (the Lee brothers), vest the lands in themselves as trustees when, at the time of signing the trust deeds, they were not owners of the lands both in law and equity as well? Please see *Lysaght*.

[17] It is manifestly clear to us from the above authorities that a trust is only valid if the title to the property is vested in the trustee completely and if the trust has been validly declared. In this case before us, the trust deed was created on 18 June 1981 when the first appellant had no title, right or interest at all in the land. All that the first appellant did was to make an application by letter dated 23 November 1979 to the relevant authorities for alienation of the land. A mere application letter does not create any title right or interest in the land. A trust cannot be created over the mere application letter for the land. In light of the fact that the first appellant had no title, right or interest at all in the land when the trust deed was created it follows that the trust deed was not completely constituted and the alleged declaration of trust by the first appellant on 18 June 1981 in favour of the respondent and the other eight beneficiaries is ineffective, null and void.

[18] It follows from the above that the respondent's lodgment of the caveat on the land based on his alleged claim of ¼ beneficial interest in the land

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- A** under the trust deed and the first deed and second deed is invalid in law. We hold that the respondent has no caveatable interest in the land when he lodged the caveat on 1 October 1993 and the caveat must be removed forthwith without the necessity of going any further. In the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 741 the Court of Appeal held:
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The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated *therein are insufficient in law* to support a caveat, *then cadit quaestio* and the caveat must be removed without the necessity of going any further. (Emphasis added.)

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THE RESPONDENT IS A VOLUNTEER

- D** [19] We next find that the learned judicial commissioner did not decide on the issue whether the respondent is a volunteer and whether the trust deed in respect of a future expectancy will be enforced by the court. He left this issue undecided. His reasoning for doing so was mainly that 'The question as to whether the plaintiff is a volunteer or otherwise was never raised in the affidavits of both parties and in the absence of any evidence to that effect it is my view that such issue cannot be properly determined by the wording of the trust deed alone'. (Appeal record p 26).
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- F** [20] We find that this was a misdirection by the learned judicial commissioner. The issue of whether the respondent is a volunteer is a question of law to be determined by the court. It is trite law that questions of law need not be raised in the affidavits. It is for counsel to raise the questions of law and make the legal submissions to the court. In *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222 at p 225 and 226 it was held as follows:

- G** It seems to me that if affidavits were allowed to contain arguments there will be no need for the assistance of counsel at the hearing in court. The point I make was also the subject of comment by Lord Justice Roskill (as he then was) in *Alfred Dunhill Ltd v Sunoptic SA* (2) at p 352 thus:

- H** I hope it is not out of place to say at this stage that the affidavits filed on both sides are in at least two cases very much too long. Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of the legal arguments in affidavits.
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So, once again, in giving leave to file, if necessary, a fresh affidavit, I would urge those responsible for drafting it to comply with O 41 r 5 and leave out of the affidavits matters relating to submissions and contentions which are for counsel to deal with at the hearing.

[21] The issue of the respondent being a volunteer was raised in the appellants written submission and was also argued by counsel for both parties in the High Court below. Therefore the issue was squarely and rightly before the court and the court was under a duty to deal with the issue. This issue was crucial to the determination of whether the trust deed was valid.

[22] In the case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 at p 625 the Supreme Court held as follows:

A volunteer is a beneficiary who has not given any valuable consideration (in the usual sense of the ordinary law of contract), for the creation of a settlement or trust.

It is a settled rule of equity that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust.

An incompletely constituted trust is one in which the trust property has not been finally and completely vested in the trustee.

[23] Again in the case of *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42 at p 44 Gill J held that:

The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison v Ellison*

I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que* trust, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a *cestui que* trust, as upon a covenant to transfer stock, if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.

- A** The general principle applicable has been enunciated by Turner LJ in *Milroy v Lord*, as follows:

B In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But, in order to render the settlement

C binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift.

D [24] In the case before us now, the trust was incompletely constituted and further the respondent did not give any consideration whatsoever for the creation of the trust. He is a mere volunteer. The court, therefore, will not render assistance to a volunteer in the case of an incompletely constituted trust.

E EXAMINATION OF THE CAVEAT FORM

F [25] An examination of the caveat lodged on the land by the respondent in Form O under s 173 of the Sarawak Land Code shows that the respondent had caveated the land in respect of his claim for his $\frac{1}{4}$ share in the land based on the trust deed, the first deed and the second deed. We have explained above that the trust deed was incompletely constituted and was invalid and ineffective in law.

G [26] The respondent has subsequently relied upon his letter dated 12 August 1999 addressed to the first appellant and the first appellant's reply dated 4 February 2000 to support the validity of the trust deed. However these two letters were not attached to the caveat application form lodged on 1 October 1993. These two letters were only exhibited by the respondent in his fourth affidavit affirmed on 2 May 2000 which was more than six years after the lodgment of the caveat form. The respondent's letter dated 12 August 1999 shows that this is the first time in eighteen years that the

H respondent had taken the trouble to inquire of the transfer of his interest in the land. There is no explanation from the respondent as to why he had slept on this matter for eighteen years. It is settled law that the court must at the first stage of the inquiry confine itself to the caveat application form itself when the caveat was lodged and not any other evidence.

I [27] In the case of *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 the Court of Appeal removed the caveat and held at pp 445 and 446 that:

Here is a case of a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

[28] We find that the learned judicial commissioner did not in his judgment make any reference to the grounds relied upon by the respondent in his caveat application form and this non-direction by the judicial commissioner amounted to a misdirection on his part.

DELAY

[29] It is settled law that the purpose of the respondent filing a caveat on the land is to preserve the status quo pending the respondent taking timeous steps to enforce his alleged claim to an interest in the land by commencing proceedings in the court of law. The respondent entered the caveat on the land on 1 October 1993. Even when he applied to the High Court on 4 January 2000 pursuant to s 178 of the Sarawak Land Code for the extension of the caveat he did not commence any legal proceedings at all to enforce his claim of $\frac{1}{4}$ th beneficial interest in the land.

[30] In the case of *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44. Lord Diplock held at p 46:

The purpose of a private caveat is to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

[31] The Court of Appeal had held in *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323 at 330 at p 331 that:

It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 215 put the matter in this way:

... once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

An illustration of the application of this principle is to be found in the case of *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 where Sinnathuray J directed the removal of a caveat because of a delay of 11 months during which period no action had been filed. I emphasise the fact that delay was the sole reason for the removal of caveat in that case.

A [32] In *Hew Sook Ying v Hin Tin Hee* [1992] 2 MLJ 189, the Supreme Court removed the caveat because (*inter alia*) the caveator did not commence legal action to enforce her rights as alleged in the caveat. The Supreme Court held at p 198 that:

B Further, even assuming for one moment that the caveator had a caveatable claim to title or registrable interest, he should not delay in filing his claim in court on the alleged claim. In the Singapore case of *Teo Ai Choo v Leong Sze Hian*, it was held that delay is fatal where at the hearing of an application to remove the caveat no writ was yet filed...

C [33] In this case the respondent lodged the caveat on 1 October 1993. He only filed the writ on 6 September 2000 and served it on the appellant on 7 December 2000. There is no explanation at all from the respondent for this delay of about seven years. We find this delay by the respondent is inordinate and inexorable and is fatal to the respondent's case. A careful reading of the learned judicial commissioner's judgment reveals that he did not address his mind at all to this issue of delay.

D [34] It is clear to us that the respondent's claim to $\frac{1}{4}$ interest in the land by virtue of the trust deed, the first deed and the second deed is completely invalid and unsustainable. The trust deed was incompletely constituted and was invalid and null and void. Further the respondent was a mere volunteer. **E** The subsequent two letters dated 12 August 1999 and 4 February 2000 respectively allegedly confirming the trust do not make the trust valid. For all the reasons that we have stated above we find that the respondent's claim of his beneficial interest in the land and the entry of the caveat on the land is plainly and obviously unsustainable. We therefore allowed the appeal with costs and ordered the caveat to be removed forthwith. **F**

[35] My learned brothers Tengku Baharudin Shah Tengku Mahmud JCA and Clement Allan Skinner J have read the draft and consented to it.

Appeal allowed.

G

Reported by K Krishnan

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I